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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 224

GEORGE S. RHODES, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Regulations Involved	2
Statement	3
Reasons for Granting Writ	4
Conclusion	7
Appendix A-Statute and Regulations	1a
Appendix B-Opinion and Judgment Below	4a

CITATIONS

CASES:

Accardi v. Shaughnessy, 347 U.S. 260	4
Crocker v. United States, 130 Ct. Cls. 567	4
Service v. Dulles, 354 U.S. 363	4, 5, 6, 7
Vitarelli v. Seaton, 359 U.S. 535	4
Watson v. United States, 162 F. Supp. 755	4, 5, 6, 7

STATUTE:

Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 5 U.S.C. 851 et seq.	2, 6

REGULATIONS:

Agency Regulation 20-705	2, 6
Civil Service Regulation 21.10 of Part 21 Chapter Z1 of Federal Personnel Manual	2

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THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on January 12, 1962.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims (R. 72) is printed in Appendix B hereto, *infra* p. 4a.

JURISDICTION

The judgment of the United States Court of Claims was entered on January 12, 1962 (R. 72). Reconsideration was denied on April 4, 1962 (R. 84). The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1255(1).

QUESTIONS PRESENTED

1. Whether the Director of the Central Intelligence Agency is not bound by validly promulgated regulations governing the dismissal of an employee even though such regulations restrict the authority of the Director which authority was delegated by statute enacted by the Congress of the United States.

2. Whether it is not mandatory for the United States Civil Service Commission to review an appeal of a discharged employee when such an appeal is based in part on an allegation of violation of regulations of an Agency concerning the discharge of an employee.

3. Whether an Agency may refuse to provide a copy of administrative regulations governing dismissal of an employee when the Agency proposes to discharge an employee pursuant to such regulations.

4. Whether an Agency may deny the right to counsel to an employee whose dismissal is proposed which dismissal is based on administrative hearings conducted within the Agency.

STATUTE INVOLVED

The statutory provision involved is based on Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 5 U.S.C. 851 et seq.

REGULATIONS INVOLVED

Agency Regulation 20-705, as it was in effect prior to January 30, 1959.

Civil Service Commission Regulation found at Part 21 of Chapter Z1 Section 21.10 of the Federal Personnel Manual.

STATEMENT

Petitioner was employed in the Central Intelligence Agency as a Grade GS-12, Analyst prior to his dismissal therefrom which dismissal was effective on March 16, 1959. Petitioner first learned of the possibility of his being dismissed in November of 1958 in a conversation with the Director of Personnel (See Exhibit "A", R. 8 herein). Exhibits "B" through "K" attached to plaintiff's complaint (R. 9-19) reflect the series of events as they transpired in the Agency up to the time of his dismissal. It is significant to note that no mention of dismissal pursuant to Section 102 (c) of the National Security Act of 1947, was made until February 13, 1959, when the petitioner was so informed as reflected in Exhibit "J" attached to petitioner's complaint (R. 18). Prior to this date petitioner has been led to believe that he was to be dismissed pursuant to the "Selection Out" Program of the Agency procedures for which were set forth in detail by the Director of Personnel in a memorandum dated January 6, 1959, copy of which is attached to petitioner's complaint as Exhibit "E" (R. 12-13).

Following petitioner's dismissal by the Agency he appealed to the U. S. Civil Service Commission which refused to review the dismissal action because it claimed that it had no authority to so act under Section 102 (c) of the National Security Act of 1947. The Civil Service Commission further refused to review the dismissal of the plaintiff to determine whether the Agency had followed its own procedures in dismissing the plaintiff.

Petitioner filed suit in the United States Court of Claims on September 1, 1960, which Court by decision dated January 12, 1962 (R. 72-77), Appendix B, *infra* p. 4a denied petitioner's claim. On March 13, 1962, petitioner filed a motion for reconsideration (R. 78) and on April 4, 1962, the Court denied the motion without opinion (R. 84).

REASONS FOR GRANTING THE WRIT

1. This Court has ruled in the case of *Service* v. *Dulles*, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, even though the administrative action to which the regulations pertain is discretionary in nature. The instant matter is identical with the case of Mr. Service in that the Director of the Central Intelligence Agency restricted his authority granted by Congress which enabled him to summarily dismiss any employee. This restriction is identical with the restriction with which the Secretary of State burdened himself in the case of *Service* v. *Dulles, supra.* The Courts have held that discretionary authority, as is here involved, cannot be abused; that decisions with such authority must not be made arbitrarily. *Crocker* v. *United States*, 130 Ct. Cls. 567, 574, 127 F. Supp. 568, 572 (1955). In this suit the petitioner has contended and again herein contends that the act of the Director of the Central Intelligence Agency was arbitrary when he refused to follow administrative regulations validly enacted by him for the purpose of granting greater protection to his employees than the law required.

The Director of the Agency herein laid down express rules to guide his subordinates and himself in exercising the sovereign power which the statute has assigned to his discretion. Petitioner thus invokes the principle which this Court has enunciated in a line of cases beginning with *Accardi* v. *Shaughnessy*, 347 U.S. 260, and running through *Service* v. *Dulles, supra, Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cls. 1958) and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Mr. Justice Frankfurter has epitomized the principle by saying that "he that takes the procedural sword shall perish with that sword". *Vitarelli* v. *Seaton, supra*, at 547. The Director of the Agency cannot promulgate regulations governing dismissal actions and then

initiate a dismissal thereunder and in the middle of the process elect to ignore his own regulations. The memoranda attached to petitioner's complaint in the United States Court of Claims (R. 8 through 26) reflect a course of action by the Director of Personnel of the Agency which was inconsistent with the action as finally taken. Such action is inconsistent with the doctrine laid down by this Court in the *Service* and *Watson Cases*, hereinbefore cited. Such inconsistency with the law of the land as enunciated by this Court must result in a reversal of the decision below and an entry of judgment by the lower Court that is consistent with this Court's prior rulings.

2. The case of *Watson* v. *United States, supra*, is further dispositive of the issue that the United States Civil Service Commission is obligated by judicial fiat to adjudicate an issue on an appeal where such issue is the allegation that the Agency involved has failed to follow its own regulations. This same issue was similarly adjudicated in the case of *Service* v. *Dulles, supra*, and yet the Civil Service Commission herein refused to review such an allegation and like the proverbial ostrich with its head in the sand blatantly ignored the ruling of this Court in *Service* v. *Dulles*, and *Watson* v. *United States, supra*. Such ignorance is not due from a lack of knowledge but rather from a lack of administrative intestinal fortitude. It is easy to force an employee into the Courts when to properly act would raise a furor within the Executive Department of the Government of the United States. The concept that ours is a nation of men and not one of laws has become the convenient rubber stamp by which the Civil Service Commission ignores the rights of man for the expedient purpose of avoiding a clash between the heads of Agencies within the Executive Branch of the Government. Such expediency on the part of the Commission is arbitrary and defiant of the rulings of this Court on such matters.

3. The Agency herein has contended (R. 13) that there were no written regulations to be given to employees governing dismissal action yet there had been promulgated Regulation 20-705 which specifically set forth that all persons entitled to Veterans Preference as set forth in the Veterans' Preference Act of 1944, as amended, would receive the same protection even though they had not been employed for a period of a year as the law required. Counsel for the Government in his oral argument before the United States Court of Claims conceded that Regulation 20-705 had been changed as of January 30, 1959, but that the form thereof was unknown to counsel prior to the said date. We have seen that the Agency contended that only regulation 20-740 was involved in the petitioner's dismissal and yet the brief of respondent below reflected that there was a Regulation entitled 20-705. Why did the Agency deliberately misstate the facts? It is submitted that a disclosure by the Agency to petitioner of all regulations involved herein would have resulted in the petitioner being able to successfully retain his position with the Agency. Such a denial by the Agency was arbitrary and inconsistent with the doctrine of "Fair Play" again reflected in *Service* v. *Dulles* and *Watson* v. *United States, supra.* It is submitted that such action was violative of the administrative rights which petitioner was entitled to receive under the Agency Regulations.

4. The Agency had advised petitioner of his right to be heard at administrative hearings held within the Agency but denied to him the right to counsel to represent petitioner at such hearings (R. 15). A right to a hearing cannot be in the interest of justice when it is stripped of all semblance of being a fair hearing. To set petitioner before the "administrative wolves" in a star chamber proceeding without counsel is the equivalent of a meal without food, a body without a heart and a Government without laws. The core of protection and the opportunity to be

fairly and impartially heard at any administrative hearing is the right to be represented by counsel. The denial of such a right is an abuse of discretion and again violative of the principles laid down in the *Service* and *Watson* cases, *supra* and is a denial of administrative due process of law and should invalidate petitioner's dismissal. The United States Court of Claims did not rule affirmatively on this matter and petitioner submits that such failure is reversible error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. WITSIL
Counsel for Petitioner

July 3, 1962

APPENDIX A

Statute Involved

Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 5 U.S.C. 851 et seq.:

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to

his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

Regulations Involved

Regulation 20-705, as it was in effect prior to January 30, 1959:

This regulation prior to January 30, 1959, varied with the regulation as is reflected in the brief of the defendant below (R. 32-33) in that it covered General Separation Actions and reflected that it would apply to separations for unsatisfactory performance under the heading of Actions based on conduct or qualifications. In addition to the foregoing, the said regulations further provided that employees entitled to the protection of the Veterans' Preference Act would be accorded the same even though they had not completed a year of employment.

* * * * * * * * * * *

Section 21.10 Part 21 Chapter Z1 of the Federal Personnel Manual:

SEC. 21.10 Removal, suspension, furlough, or demotion of preference employees. This section shall apply to permanent and indefinite employees entitled to five- or ten-point preference under the regulations in this part but shall not apply to (a) employees during their first year of current continuous Federal or District of Columbia service, (b) employees appointed for periods specifically limited to one year or less, or (c) employees whose annuity under the Civil Service Retirement Act, as amended, was continued upon reemployment in an appointive position on or after October 1, 1956.

Any employee subject to this section who is proposed for involuntary discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation, shall have at least thirty days advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action. Such employee shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting. Such appeal shall be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such employee shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with rules and regulations of the Commission. After investigation and consideration of the evidence submitted, the Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or his designated representative, and if the findings and recommendations are favorable to the employee, it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Commission may declare any such employee who may have been dismissed or furloughed without pay to be eligible for entry of his name on the agency reemployment list established under section 21.6 (b).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 341-60
(Decided January 12, 1962)

GEORGE S. RHODES

v.

THE UNITED STATES

John P. Witsil for plaintiff.

Edward J. Reis, with whom was *Assistant Attorney General William H. Orrick, Jr.,* for defendant.

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge,* delivered the opinion of the court:

This is an action by plaintiff to recover damages for an alleged wrongful termination of employment by the Central Intelligence Agency.

Plaintiff alleges that he was terminated in violation of the Veterans' Preference Act of 1944, as amended, 5 U.S.C. 851 *et seq.*, the regulations of the Civil Service Commission and of the Central Intelligence Agency.

Defendant contends that plaintiff's termination was pursuant to the authority granted the Director of the Central Intelligence Agency by section 102(c) of the National Security Act of 1947, 61 Stat. 495, 498, and as set forth in Regulation 20-740.

The case arises on cross-motions for summary judgment and presents two questions: (1) whether the Director of

the Central Intelligence Agency had discretion to terminate plaintiff's employment with the Agency when the Director deemed such termination either necessary or advisable in the interests of the United States, and (2) whether the agency violated its own regulation in terminating plaintiff's employment.

The facts are summarized as follows: Plaintiff was employed by the Central Intelligence Agency as a Document Analyst, Grade GS-12, at an annual salary of $8,570, prior to his dismissal on March 16, 1959. His position was a secretive one and its description is classified. This is made evident by the oath taken by plaintiff as an incident to employment to the effect that he would never divulge or reveal any classified information, or intelligence, or the methods of collecting and handling such information or intelligence. He further agreed that no change of assignment or employment would ever relieve him of such obligation.

On February 10, 1959, the Director of the Central Intelligence Agency determined that termination of plaintiff's employment was necessary and advisable in the interests of the United States. The Director then, exercising his discretion under the authority granted by section 102(c) of the National Security Act of 1947, *supra*, terminated plaintiff's employment.

Plaintiff thereafter sought to appeal this termination of employment to the Civil Service Commission. An appeals examiner of the Civil Service Commission determined that plaintiff was separated from his position in the Central Intelligence Agency pursuant to section 102(c), *supra*, and determined that the Director of the Central Intelligence Agency could terminate the employment of an employee of the Agency whenever he deemed it to be in the in the interests of the United States, notwithstanding the provisions of the Civil Service Act, the Veterans' Preference Act or the provisions of any other law. The examining officer further stated that plaintiff's contentions, *supra*, concerning

the Central Intelligence Agency's failure to follow its own regulations were not within the jurisdiction of the Civil Service Commission and were, therefore, referred to the Central Intelligence Agency for whatever action it deemed appropriate.

The decision of the appeals examining officer was then appealed to the Board of Appeals and Review of the Civil Service Commission which, on June 26, 1959, after reviewing the case, again stated that neither the Civil Service Act, nor the Veterans' Preference Act, nor any other law, is applicable to termination of employment under the authority of section 102(c) of the National Security Act, *supra*. The decision of the appeals examining officer was affirmed.

On June 2, 1959, as a result of plaintiff's allegations that the Agency had failed to follow its own regulations in terminating plaintiff's employment, the General Counsel of the Central Intelligence Agency wrote plaintiff stating that the only administrative regulation of the Agency, applicable to termination of employment under section 102(c), was Regulation 20-740.

Later, on July 9, 1950, the Agency further informed plaintiff that the Agency found no basis for plaintiff's allegation that it had failed to follow its own regulations.

This suit result, and claim is made by the plaintiff that he first learned of the possibility of his being dismissed in November of 1958 and that no mention of his dismissal pursuant to section 102(c), *supra*, was made until February 13, 1959. Plaintiff further contends that he was led to believe that he was to be dismissed pursuant to the "selection out" program of the Agency, procedures for which were provided for within the Agency (Regulation 20-705).

Plaintiff then alleges and contends that he was not given the protection of those procedures although he requested the same.

Regulation 20-705, dated January 30, 1959, reads as follows:

1. GENERAL

a. This regulation states the requirements and procedures applicable to certain separation actions. This regulation governs the separation of Agency employees for all reasons except reduction in force, entry into military service, separation based on adverse findings of a security hearing board, and termination by the Director under the authority granted him by section 102(*c*) of the National Security Act of 1947 (61 Stat. 495, 50 U.S.C. 401, P.L. 253, 80th Congress, first session), as amended, and as set forth in Regulation No. 20-740.[1]

It is noted that the above Regulation specifically provides that it is not applicable to termination under section 102(*c*) of the National Security Act, *supra*.

Regulation 20-740, dated November 1, 1954, under which defendant contends that plaintiff's employment was terminated, reads as follows:

1. STATUTORY POWERS OF THE DIRECTOR OF CENTRAL INTELLIGENCE

The Director of Central Intelligence is empowered to terminate the employment of any officer or employee of the Agency whenever he deems such action necessary or advisable in the interests of the United States. Termination action under this authority, quoted below, is within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law.

[1] Plaintiff seems to say that Regulation 20-705 contained something different from the quoted regulation at the time of his termination. His petition and brief are silent on this point and contain no citation or copy of any other regulation.

"Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

2. EMPLOYMENT REVIEW BOARD

The Director may appoint an Employment Review Board to advise him concerning any particular case.

* * * * *

Cases are legion holding that the Government, as an employer, has the right to terminate the employment of any of its employees at any time, providing there is no statute or regulation limiting this right. *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed 341 U.S. 918; *Kent* v. *United States*, 105 Ct. Cl. 280.

In the instant case, we can find no regulation that was violated. All the exhibits, together with the affidavits of the Director of the Central Intelligence Agency, disclosed that plaintiff's employment was terminated pursuant to section 102(c), *supra*, and Regulation 20-740 thereunder, and clearly this statute and regulation gave the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deemed it necessary or advisable. Under these circumstances the Agency was within its rights when it terminated plaintiff's employment, and the Civil Service Commission correctly declined to overturn the decision of the appeals examining officer.

Moreover, even if, as plaintiff alleges, the original bases for dismissal were under something different from section

102(c), certainly the final action was under section 102(c), and we know of no provision of law or regulation that would prevent the Agency Director from changing the character of dismissal. As a matter of fact, there is precedent for permitting a change in its method of procedure before plaintiff's employment was terminated. *Atkinson* v. *United States*, 144 Ct. Cl. 585; *Hoppe* v. *United States*, 136 Ct. Cl. 559, cert. denied 355 U.S. 816; *Misuraca* v. *United States*, 135 Ct. Cl. 387; *DeBusk* v. *United States*, 132 Ct. Cl. 790, cert. denied 350 U.S. 988; *Thomas* v. *Ward*, 225 F. 2d 953, cert. denied 350 U.S. 958. However, we do not think the Director did deviate from the original path. At all times, the only regulation which applied under section 102(c) was the quoted Regulation 20-740 that contained a copy of section 102(c), *supra*, and this is the only regulation relied on by the Director.

It is true that the Executive Officer of the Office of Personnel of the Central Intelligence Agency did fully explain to plaintiff the reasons for proposed dismissal and invite him to reply to same. However, there was no regulation requiring such action. This was purely a voluntary act and in no sense could give rise to a contention that because he did this some other course should have been taken which embraced some regulation other than that under which plaintiff was dismissed. Furthermore, the Executive Officer specifically stated in his memorandum to plaintiff that final action would be taken by the Director pursuant to the National Security Act, *supra*, and the memorandum further stated that Regulation 20-740, *supra*, was the only regulation specifically concerned in a case of this sort.

The fact that plaintiff was given the opportunity to accept a lesser job does not affect the procedures above outlined. Plaintiff's brief contains a statement to the effect that plaintiff's employment as a Grade GS-12 was not in the interests of the United States, but that his employment as a Grade GS-9 was in the interests of the United States. In this

respect, we can think of many reasons why plaintiff's employment as a Grade GS-9 could be in the interests of the United States, while employment as a Grade GS-12 would not be. We do not know, because of the necessary secrecy involved, what duties are attached to the various grades within the Agency. We do know, however, from human experience that the higher the office the greater the responsibilities and consequent security aspects. In the light of this, we can find no fault with the statute and regulation which gave plaintiff the right, if declared eligible, to accept employment in any other department or agency of the Government, and by the same token gave the Agency authority to offer a lesser position.

For the reasons stated above, we hold that no regulation of the Central Intelligence Agency was violated when plaintiff's employment was terminated and, consequently, the action of the Civil Service Commission could not be arbitrary, capricious or contrary to law. Since all pertinent regulations were followed, the Supreme Court's decision in the case of *Service* v. *Dulles*, 354 U.S. 363, and this court's decision in *Watson* v. *United States*, 142 Ct. Cl. 749, are inapplicable.

Defendant's motion for summary judgment is granted, and plaintiff's cross-motion is denied. Plaintiff's petition will be dismissed.

It is so ordered.

Reed, *Justice* (*Ret.*), sitting by designation; Durfee, *Judge*, and Jones, *Chief Judge*, concur.

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No. 206

In the Supreme Court of the United States

October Term, 1962

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute and regulations involved	2
Statement	4
Argument	6
Conclusion	10

CITATIONS

Case:	
Service v. *Dulles*, 354 U.S. 363	6, 8
Statutes and Regulations:	
National Security Act of 1947, Section 102(c), 61 Stat. 498, 50 U.S.C. 403(c)	2, 4, 5, 6, 9, 10
Veterans Preference Act, Section 14, 5 U.S.C. 863	4, 7, 10
CIA Regulation 20–705	2, 6, 8, 9
CIA Regulation 20–740	3, 5, 6, 9
Civil Service Commission Regulation 21.10, 5 C.F.R. 21.10	7

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 224

GEORGE J. RHODES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 4a–10a) is not yet reported.

JURISDICTION

The order of the United States Court of Claims dismissing the petition was entered on January 12, 1962. A petition for rehearing, timely filed, was denied on April 4, 1962. The petition for writ of certiorari was filed on July 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether removal of petitioner from his position as a document analyst in the Central Intelligence

Agency was in compliance with applicable statutory procedures and regulations.

STATUTE AND REGULATIONS INVOLVED

Section 102(c) of the National Security Act of 1947, 61 Stat. 498, 50 U.S.C. 403(c), provides as follows:

> (c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

CIA Regulation 20–705, dated 30 January 1959, provides in relevant part as follows:

> 1. GENERAL
>
> a. This regulation states the requirements and procedures applicable to certain separation actions. This regulation governs the separation of Agency employees for all reasons except reduction in force, entry into military service, separation based on adverse findings of a security hearing board, and termination by the Director under the authority granted him by section 102(c) of the National Security Act of 1947 (61 Stat. 495, 50 U.S.C. 401, P.L. 253, 80th

Congress, first session), as amended, and as set forth in Regulation No. 20–740.

* * * * *

CIA Regulation 20–740, dated 1 November 1954, provides:

1. STATUTORY POWERS OF THE DIRECTOR OF CENTRAL INTELLIGENCE

The Director of Central Intelligence is empowered to terminate the employment of any officer or employee of the Agency whenever he deems such action necessary or advisable in the interests of the United States. Termination action under this authority, quoted below, in within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law.

"Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

2. EMPLOYMENT REVIEW BOARD

The Director may appoint an Employment Review Board to advise him concerning any particular case.

STATEMENT

Petitioner was employed by the Central Intelligence Agency as a document analyst (R. 2, 19). The position is an extremely sensitive one. Even its description is classified (R. 34, 47).

On November 21, 1958, petitioner was orally advised that the termination of his employment was being considered (R. 2, 8, 55). Subsequently, on January 6, 1959, he received a memorandum from the Agency's personnel officer. It notified petitioner of the provisions of section 102(c) of the National Security Act of 1947, *supra*, p. 2, and indicated their applicability to his proposed termination. Reference was also made, by name, to CIA Regulation 20–740, *supra*, p. 3 (R. 12–13).

On February 10, 1959, the Director of Central Intelligence made the determination that it was advisable in the interests of the United States to terminate petitioner's employment with the C.I.A. under section 102(c) of the National Security Act (R. 49). Petitioner was advised of this decision by memorandum dated February 13, 1959 (R. 18, 50). On March 16, 1959, his employment was terminated (R. 19).

Petitioner then sought to appeal the termination of his employment to the Civil Service Commission. The Appeals Examining Office of the Commission noted: (1) that petitioner was separated from his position with the C.I.A. pursuant to section 102(c) of the National Security Act; (2) that the Commission has held that the provisions of section 14 of the Veterans Preference Act are not applicable to removal of preference eligible employees effectuated

under the authority of section 102(c); and (3) that employees so removed have no right to appeal to the Commission. The Office stated further that petitioner's allegation that the C.I.A. had failed to follow its own regulations was not within the jurisdiction of the Civil Service Commission. This contention was referred to the C.I.A. for whatever action it might deem appropriate (R. 20-21).

Petitioner then appealed the decision of the Appeals Examining Office to the Civil Service Commission's Board of Appeals and Review. After giving the case full consideration, the Board affirmed the conclusions of the Appeals Examining Office in all respects (R. 22–23).

Shortly thereafter, the C.I.A.'s General Counsel responded to the averments that the agency had not followed its own regulations in terminating petitioner's employment. He stated that the only administrative regulation applicable to termination of employment under section 102(c) was CIA Regulation 20–740 (R. 24–25). Since that regulation has no procedural requirements, the agency could find no basis for the allegation that it had failed to follow its own regulations (R. 26).

The Court of Claims held that petitioner's employment was terminated pursuant to section 102(c) of the National Security Act and CIA Regulation 20–740 (R. 75, Pet. App. 8a). It found that the agency violated no regulation in effecting such termination, and consequently that the action of the Civil Service Commission in refusing to entertain

that issue could not be deemed arbitrary, capricious, or contrary to law (R. 77, Pet. App. 10a).

ARGUMENT

The decision of the court below is clearly correct and there is no conflict with any other decision. Moreover, the petition presents no question of general importance. Further review is, therefore, not warranted.

1. Section 102(c) of the National Security Act of 1947, *supra*, p. 2, provides that, "[n]otwithstanding the provisions * * * of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States * * *." As noted in CIA Regulation 20–740, issued in 1954, *supra*, p. 3, "[t]ermination action under this authority * * * is within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law."

Petitioner does not question the import of section 102(c). Nor does he endeavor to challenge the validity of the section as construed in the above regulation. Rather, his claim that the termination of his employment was improper rests on the premise that the agency's action was initiated under CIA Regulation 20–705, *supra*, pp. 2–3, which establishes procedures for certain types of separations, but *not* including those resulting from the exercise of the Director's authority under section 102(c). On this premise, and relying principally on *Service* v. *Dulles*, 354 U.S. 363, petitioner asserts that he was entitled to the bene-

fit of that Regulation, section 14 of the Veterans Preference Act, 5 U.S.C. 863, and Regulation 21.10 of the Civil Service Commission, 5 C.F.R. 21.10.

a. The record refutes petitioner's claim as to the basis on which his termination was initiated. It was neither alleged nor shown that Regulation 20–705, or any regulation other than 20–740, was ever mentioned to petitioner. Furthermore, contrary to petitioner's contention advanced below and again in this Court (Pet. 3), the memorandum of the agency's Personnel Officer, dated January 6, 1959, fully notified petitioner of the pertinent terms of the Nation Security Act, and the applicability of Regulation 20–740:

* * * * *

> 4. * * * However, if I agree with the action of the Career Board which refers the case to me and find further that the individual concerned is not suitable for employment elsewhere in the Agency, I must recommend that his termination is advisable in the national interest. Such recommendation must go to the Director of Central Intelligence as he is given the discretionary authority in the National Security Act of 1947 to terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States. This authority is given notwithstanding the provisions of any other law and requires no specific procedures or regulations. * * *
>
> 5. The only regulation specifically concerned in a case of this sort is CIA Regulation 20–740, which merely sets forth the Director's statutory authority. Aside from this regulation,

> there is no Agency regulation to furnish you an [*sic*] answer to your request, but I believe the foregoing should furnish you adequate information for the full understanding of your situation.
>
> * * * * *

At the time petitioner was first informed that his dismissal was being considered, the Personnel Officer offered him a hearing. Conceivably, this misled petitioner as to the applicable regulation. But the memorandum of January 6, 1959, given petitioner over ten weeks prior to his final termination, certainly clarified this point:

> * * * * *
>
> 3. As a normal personnel function, it is my duty to review the case and make an appropriate recommendation in light of the Agency's needs. In carrying this out, I believe it is necessary and appropriate not only to review the action of the Career Board and the basis therefor, but also to provide a hearing for the employee concerned to make sure in the first place that he thoroughly understands the situation and, secondly, has an opportunity to present his side of the story. ***This is not a matter of regulation*** but what I deem fair and proper treatment of the case. * * * [Emphasis added.]
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> * * * * *

b. Even if petitioner's dismissal had been initiated under Regulation 20–705, his reliance on *Service* v. *Dulles, supra,* would have been misplaced. The rule laid down in that case merely requires an agency or department effecting a dismissal under particular statutory authority to follow all of its regulations

pertinent to such a dismissal. Stated otherwise, it must first be determined under what authority the employee was discharged, and then ascertained whether the requirements of the administrative regulations (if any) applicable to terminations under that authority have been observed.

Petitioner does not dispute that, as he was expressly advised, his termination was effected by the Director of Central Intelligence under section 102(c) of the National Security Act and CIA Regulation 20–740. In these circumstances, Regulation 20–705 was, in terms, inapplicable. Again, that regulation specifically states that it does not apply to "termination by the Director under the authority granted him by section 102(c) of the National Security Act of 1947 * * * and as set forth in Regulation No. 20–740."

2. Since CIA Regulation 20-705 was not applicable, there is no substance to petitioner's contention that the agency's failure to supply him with a copy of it was prejudicial. Similarly, the agency's refusal to permit petitioner representation by counsel at the hearing offered by the Personnel Officer was not a denial of any of his rights. The only applicable regulation is 20–740, and it does not subject the Director's exercise of discretion to any procedural requirements.

3. Petitioner also challenges the refusal of the Civil Service Commission to entertain the question of whether the C.I.A. failed to observe its own regulations in effectuating his dismissal. While petitioner presumably relies on section 14 of the Veterans Pref-

erence Act, the Commission correctly concluded that this section has no application to dismissals under section 102(c) of the National Security Act. In explicitly excepting the exercise of the Director's discretionary authority from the force of "the provisions of any other law", Congress rendered inoperative, as to section 102(c) terminations, the appeal procedures provided by section 14 of the Veterans Preference Act, no less than its other provisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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